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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CHARLES DIMRY,

Plaintiff,

vs.

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; THE NFL PLAYER SUPPLEMENT DISABILITY PLAN; and DOES 1-10, inclusive,

Defendant.

Case No. 3:16-cv-1413-JD

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

Judge: Honorable James Donato

Date: May 17, 2018
Time: 10:00 a.m.
Courtroom: 11 – 19th Floor

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I. INTRODUCTION

Plaintiff's eight-page complaint contained three claims.[1] It sought relief for alleged breaches of fiduciary duty, statutory penalties under ERISA, and "a determination that Plaintiff is entitled to receive benefits under the Plan and an injunction mandating the payment of benefits."[2] The Court dismissed two of these three claims and remanded the third "for re-evaluation" because "the record is mixed and does not clearly establish Dimry's eligibility for benefits."[3] No benefits were awarded. Yet Plaintiff seeks more than $280,000 in fees.

The Court should start with first principles. An award of fees falls within this Court's discretion, and it is proper only when (1) the *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980) factors as a whole favor an award, (2) the time spent on the matter and the hourly rates are reasonable, and (3) counsel accurately and appropriately recorded their work. Plaintiff has not met his burden on any of these issues. He has failed to win a single dollar. He has failed to demonstrate that the *Hummell* factors favor any fees whatsoever. He has failed to show that the hours expended on the case are reasonable. And he has failed to provide adequate time entries (they block bill, bill attorney hours for administrative work, and submit entries that are duplicative and/or vague).

In the circumstances, the Court should deny attorneys' fees at this time or hold a decision on the motion until remand is complete.

II. ARGUMENT & AUTHORITIES

A. The *Hummell* factors counsel against an award of fees.

Under ERISA, an award of fees is not automatic; the matter falls within this Court's discretion.[4] But "a judge's discretion is not unlimited."[5] To win an award of attorneys' fees, a

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[1] Pl.'s Second Am. Compl. ("SAC") (Dkt. 77) ¶¶ 27-43.

[2] *Id.* at 8.

[3] March 12, 2018 Order re: Mots. ("Order") (Dkt. 80) at 8.

[4] 29 U.S.C. § 1132(g)(1) ("[T]he court in its discretion may allow a reasonable attorney's fee and costs of action to either party").

[5] *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) (quoting *Perdue v. Kenny A.*, 559 U.S. 542, 558 (2010)).

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Plaintiff must establish that the five *Hummell* factors, as a whole, favor an award.[6] As described below, they do not do so.

Degree of culpability or bad faith. Plaintiff's counsel argues that the first factor supports his case because "fail[ing] to fulfill [a] legal duty" is sufficient to show bad faith.[7] But this Court has held just the opposite. If a finding that a claims fiduciary has abused its discretion "ipso facto demonstrate[s] . . . bad faith[,] . . . bad faith would be established as a matter of course in every case where a plan administrator is found to have abused its discretion, effectively rendering this factor superfluous."[8]

Beyond superficial and conclusory allegations of bad faith, Plaintiff has failed to demonstrate that the Board acted in bad faith.[9] Nor can he. This is not a situation in which the Board—which is comprised of both Player and NFL representatives[10]—egregiously denied a bullet-proof benefits claim. As the Court acknowledged, "the record does not show bad faith on the Plan's part,"[11] and "the record is mixed and does not clearly establish Dimry's eligibility for

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[6] *Simonia v. Glendale Nissan/Infiniti Disability Plan*, 608 F.3d 1118, 1122 (9th Cir. 2010) (declining to award fees after considering the *Hummell* factors, and holding that "[i]n order to grant fees under 29 U.S.C. § 1132(g)(1), courts must first determine whether a litigant has achieved some degree of success on the merits. If so, courts must then determine whether the *Hummell* factors weigh in favor of awarding that litigant attorney's fees.").

The *Hummell* factors are:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S. E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

[7] Pl.'s Notice of Mot. and Mot. for Att'ys' Fees and Costs; Mem. of Points and Authorities in Supp. ("Pl.'s Mot.") (Dkt. 86) at 5.

[8] *Cox v. Allin Corp. Plan*, No. 12-cv-5880, 2015 WL 13036924, at *3 (N.D. Cal. July 10, 2015) (Armstrong, J.).

[9] For the purposes of this memorandum, "the Board" refers to the named Defendants.

[10] *See* Defs.' Notice of Mot. and Rule 12(b)(6) Mot. to Dismiss Count II of Pl.'s Compl.; Mem. in Supp. of Mot. (Dkt. 13) at 2 n.7 (citing Plan Document for proposition that "[t]he Board consists of three voting members appointed by the NFL Players Association, and three voting members appointed by the NFL Management Council").

[11] Order at 7.

benefits."[12] In such a situation, bad faith does not exist.

On the other hand, Plaintiff filed a frivolous breach of fiduciary duty claim, which this court readily dismissed. It is hornbook ERISA law that the denial of a disputed benefit claim does not create a breach of fiduciary duty.[13] On balance, this factor therefore weighs in favor of the Board.

Deterrence effect. Plaintiff urges the court to award his counsel high fees because ERISA does not allow for punitive damages. Plaintiff argues that such an award will deter the Board and "other ERISA fiduciaries" from the act of "commit[ting] 'abandonment of discretion.'"[14]

Plaintiff's argument is perverse. ERISA's prohibition of punitive damages is an argument *against* a high fee award, not in favor of it. It is especially improper to use an award of attorneys' fees for punitive purposes where the assets of the Plan would otherwise be used to pay benefits that are owed to all Plan participants and beneficiaries.

Next, the deterrence question is not whether the award will deter all types and manners of abuses of discretion, but whether a fee award will deter other claims fiduciaries from taking the *specific actions* that the Court found led to the abuse of discretion. Here, the Court found that the Board abused its discretion by not fully explaining why it weighed the opinions of the Plan's neutral physicians more heavily than those of Dimry's doctors and consultants.[15] It is difficult to ascribe much of a deterrent effect to the Court's ruling when the Department of Labor, in brand new regulations applicable to all disability benefit claims filed after April 1, 2018, has imposed a specific requirement on disability plans include in their claims procedures an explicit requirement to explain why they disagree with treating physician reports, vocational expert reports, and Social

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[12] *Id.* at 8.

[13] *See* 6/14/2016 Order re: Mot. to Dismiss (Dkt. 33) at 1 ("As Dimry acknowledged at the hearing, an ERISA breach of fiduciary breach claim must be based on facts plausibly alleging that a claim beyond his own was mishandled or that a plan-wide injury has occurred.") (citing case law).

[14] Pl.'s Mot. at 6.

[15] Order at 7.

Security determinations.[16] In other words, the Department of Labor is now requiring all plans to include written instructions mandating such content in claims denial letters, and thereby requiring all disability decision-makers to perform the analysis that the court has faulted the Board for not performing (albeit on a decision the Board rendered nearly three years ago, before the new regulations took effect). An award of attorneys' fees in this case thus will not coerce or deter any action other than what the Department of Labor is now requiring, and would merely be punitive, as Plaintiff concedes. This factor therefore weighs in favor of the Board.

Whether Plaintiff sought to benefit all participants or resolve a significant ERISA legal issue. Plaintiff does not contend that he sought to resolve a significant legal issue under ERISA, only that Plaintiff's suit "could have a deterrent effect . . . which will ultimately benefit other claimants."[17]

Plaintiff misunderstands the purpose of this factor. The question is not whether the suit *could* have an effect on *some* participants and beneficiaries, but whether Plaintiff in fact "*sought* to benefit *all* participants and beneficiaries of an ERISA plan."[18] Plaintiff sued solely for himself, he did not seek to have a term in the Plan clarified, and he did not achieve a result that will provide a benefit to others.[19] Rather, "[h]e sought only to have his own disability recognized and his own individual claim paid."[20] This factor therefore weighs in favor of the Board.

Relative merits. Plaintiff's counsel cites *McClure* to argue that they need not "prevail on every issue in [the] litigation" to win this factor, but only on "*any significant issue* in litigation

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[16] *See* 29 C.F.R. § 2560.503-1(j)(6) (effective April 1, 2018).

[17] Pl.'s Mot. at 6.

[18] *Hummell*, 634 F.2d at 453 (emphasis added).

[19] *Gurasich v. IBM Ret. Plan*, No. 14-cv-2911, 2016 WL 3683044, at *5 (N.D. Cal. July 12, 2016) ("Plaintiff's suit did not seek relief for other plan participants besides herself; she sought to recover her own pension benefits. Plaintiff argues that the court's determination in this case will benefit other plan participants. This is a stretch. This case focused heavily on the specific factual circumstances of Plaintiff's employment with a number of related corporate entities.") (Ryu, M.J.).

[20] *Nagy v. Grp. Long Term Disability Plan for Employees of Oracle Am., Inc.*, No. 14-cv-38, 2017 WL 725740, at *6 (N.D. Cal. Jan. 17, 2017), *report and recommendation adopted*, No. 14-cv-38, 2017 WL 713126 (N.D. Cal. Feb. 23, 2017) (weighing against awarding fees where plaintiff brought individual disability claim and therefore conferred only "remote benefit" on others) (Beeler, M.J.).

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which achieves *some of the benefit sought*."[21] Plaintiff's analysis of *McClure* depends on a highly selective reading of its holding. *McClure* states that a participant must *first* "prevail[] in an action to enforce rights under the plan" before a court may award fees.[22] The Ninth Circuit went on to say that, "[b]ecause we remand to the district court, neither party has yet 'prevailed' in this action. McClure's request for fees must await a final determination on the merits."[23] *McClure* disfavors an award of fees at this stage, and counsels for waiting until "a final determination on the merits" is made by the Board on remand.[24] It is only then that the measure of Plaintiff's success, or lack thereof, can be measured.

In addition, the Court has acknowledged that the evidence in this case does not clearly establish Plaintiff's eligibility for benefits.[25] In such a situation, where the evidence is not decisive, it cannot be said that this factor weighs in favor of either party. At best, this prong of *Hummell* is neutral at this point in time.

Because, on balance, the *Hummell* factors weigh in favor of the Board, the Court should decline to award attorney's fees to Plaintiff's counsel.

B. Plaintiff's request for fees is exorbitant.

To determine fees, courts use a lodestar analysis—the number of hours reasonably expended on the litigation multiplied by an hourly rate that is reasonable for the district in which the Court sits.[26] The moving party

> bears the initial burden of establishing the hours expended litigating the case, and must provide detailed time records documenting the tasks completed and the amount of time spent. The requesting party also has the burden to demonstrate that the rates requested

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[21] Pl.'s Mot. at 7 (citing *McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1136 (9th Cir. 1996)).

[22] *McClure*, 84 F.3d at 1136.

[23] *Id.*

[24] Plaintiff's counsel also cites to *Caplan v. CNA Fin. Corp.*, 573 F. Supp. 2d 1244, 1248 (N.D. Cal. 2008) (Wilken, J.), in support for their argument on this factor. But *Caplan* is distinguishable because the Court there actually awarded disability benefits to the plaintiff. *Id.*

[25] Order at 8 ("[T]he record is mixed and does not clearly establish Dimry's eligibility for benefits.")

[26] *Gurasich*, 2016 WL 3683044, at *5.

are in line with the prevailing market rate of the relevant community.[27]

Plaintiff's request for fees fails to meet these basic requirements.

1. Plaintiff's counsel seeks fees for two claims that were readily dismissed by the Court.

"The fee applicant bears the burden of establishing entitlement to an award."[28] To win fees, Plaintiff must first demonstrate that he achieved "*Hardt* success," defined as "some degree of success on the merits."[29] *Hardt* success is measured against each claim a plaintiff has brought, so where a plaintiff has achieved "some degree of success on the merits" with respect to one claim but not others, courts will award fees only for the work on those claims that were successful and not for work on claims that were dismissed, so long as the dismissed claims do not share a "common core of facts" with a claim on which plaintiff met the *Hardt* standard.[30]

Plaintiff brought three claims: a claim for benefits under ERISA section 502(a)(1)(B)[31] ("Benefits Claim"), a claim for breach of fiduciary duty under ERISA section 502(a)(3)[32] ("BOFD Claim"), and a claim for penalties under ERISA section 502(c)(1)[33] for failure to produce documents ("Penalties Claim").[34] Neither the BOFD Claim nor the Penalties Claim meet the *Hardt* standard. Plaintiff lost both Claims, and neither shares a "common core of facts" with his personal benefit claim.

The BOFD claim sought class-wide relief in connection with such outlandish allegations as the following: (1) the Board "[c]onsciously and unreasonably refus[ed] to pay Plaintiff's claim, and related claims and/or similar claims, with the knowledge that Plaintiff's claim and similar claims are payable and with the intent of boosting profits at Plaintiff's and other claimants'

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[27] *Id*. (internal citations omitted).

[28] *Id*. at *9.

[29] *Hardt*, 560 U.S. at 245.

[30] *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

[31] 29 U.S.C. § 1132(a)(1)(B).

[32] 29 U.S.C. § 1132(a)(3).

[33] 29 U.S.C. § 1132(c)(1).

[34] SAC ¶¶ 27-43.

expense,"[35] (2) the Board "[c]onsciously, unreasonably and intentionally and without justification select[ed] Plan physicians that have no vocational training,"[36] and (3) the Board "[c]onsciously and unreasonably interpret[ed] the Plan in a manner designed to deny and minimize benefits and in a manner which thwarts the reasonable expectations of the Plan's beneficiaries and participants in order to maximize its own profits and minimize the benefits it pays claimants."[37]

Such allegations of program-wide misconduct and fraud were not part of "common core of facts" at issue in Plaintiff's personal benefit claim, and this Court readily concluded that there was no basis for them. Indeed, Plaintiff and his counsel included these disparaging allegations despite not knowing how the Plan selects physicians, how many claims the Plan approves, and how much money it pays every month and to how many individuals. It is hard to understand how counsel could expect to shift the cost of pursuing this baseless claim to the Board.

Plaintiff's claim for penalties for failure to produce documents should not be rewarded either.[38] It shared no "common core of facts" whatsoever with his personal benefit claim.

2. Neither Terrance Coleman's $900 per hour rate Nor Michael Quirk's $450 per hour rate are reasonable.

The requested fee award is based in part on an hourly rate of $900 for Terrance Coleman's time and $450 for Mr. Quirk's.[39] Mr. Coleman supports his $900 rate with affidavits from two attorneys who practice in this forum—one who stated that he charges $800 per hour and another $750. Although both also vouch for Mr. Quick's $450 per hour rate, only one of these attorneys actually states that he is familiar with Mr. Quirk's work. Neither of the affidavits support rates as high as $900 or $450 per hour.

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[35] Pl.'s Orig. Compl. (Dkt. 1) ¶ 39I.

[36] *Id.* ¶ 39C.

[37] *Id.* ¶ 39H.

[38] *Gurasich*, 2016 WL 3683044, at *13 ("The fourth claim also involved different facts. Plaintiff's statutory penalties claim was based on the undisputed fact that Defendants did not produce the MBA during the pendency of her administrative claim. Her claim for benefits focused on numerous and completely non-overlapping factual issues. The court therefore finds that Plaintiff's unsuccessful statutory penalties claim is unrelated to her claim for benefits, and determines that it is not appropriate to award fees for time spent on this claim.").

[39] Pl.'s Mot. at 9.

When assessing fees, "evidence of billing rates awarded in ERISA cases in the region *must* be considered."[40] Surveying the hourly rates for senior partners and associates that this Court has approved in ERISA benefits lawsuits is the best approach to determine a reasonable rate. Since January 1, 2016, the average approved rate for the senior partner in each ERISA matter was $666,[41] and $700 is the highest rate this Court has approved (just once).[42] Mr. Coleman's $900 rate—$200 higher than any rate this Court has ever approved in an ERISA benefits case—is not even close. Likewise, Mr. Quirk's rate is above the $425 per hour average for associates.[43]

3. The time entries and total time billed are not appropriate.

Plaintiff's counsel has failed to meet its burden of "provid[ing] detailed time records documenting the tasks completed and the amount of time spent."[44]

First, time entries must demonstrate "billing judgment with respect to hours worked," which means that the requesting party has made "a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[45] "In the absence of a showing

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[40] *Crosthwaite v. Legg Inc.*, No. 13-cv-1065, 2014 WL 1647525, at *8 (N.D. Cal. Apr. 17, 2014), *report and recommendation adopted*, No. 13-cv-1065, 2014 WL 1618576 (N.D. Cal. Apr. 21, 2014) (White, J.) (emphasis added) (citing *Welch v. Metro Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir. 2007)); *see also Bd. of Trustees v. Piedmont Lumber & Mill Co.*, No. 13-cv-3898, 2016 WL 4446993, at *2 (N.D. Cal. Aug. 24, 2016) (approving partner rate of $400 based on comparison between requested rates and those awarded in other ERISA cases in the Northern District of California) (Gilliam, Jr., J.).

[41] *Gurasich*, 2016 WL 3683044, at *12 ($650); *F. v. Blue Shield of California*, No. 09-cv-2037, 2016 WL 1059459, at *9 (N.D. Cal. Mar. 17, 2016) ("The court finds that $650/hr. is a reasonable rate for Mr. Lilienstein, who is an experienced ERISA litigator who practices in the Bay Area and has an office in San Francisco.") (Hamilton, J.); *Nagy*, 2017 WL 725740, at *8 ($675); *Tom v. Hartford Life & Accident Ins. Co.*, No. 16-cv-1067, 2017 WL 6209306, at *5 (N.D. Cal. Dec. 8, 2017) ($650) (Alsup, J.); *Bosley v. Metro. Life Ins. Co.*, No. 16-cv-139, 2017 WL 4071346, at *3 (N.D. Cal. Sept. 14, 2017) ($650) (Alsup, J.); *Norris v. Mazzola*, No. 15-cv-4962, 2017 WL 6493091, at *12 (N.D. Cal. Dec. 19, 2017) ($680) (Corley, M.J.); *Montoya v. Reliance Standard Life Ins. Co.*, No. 14-cv-2740, 2017 WL 2081163, at *2 (N.D. Cal. May 15, 2017) ($675) (Orrick, J.); *Stewart v. Applied Materials, Inc.*, No. 15-cv-2632, 2017 WL 3670711, at *10 (N.D. Cal. Aug. 25, 2017) ($700) (Tigar, J.).

[42] *Stewart*, 2017 WL 3670711, at *10 ($700).

[43] *Norris*, 2017 WL 6493091, at *12 ($480, $450, $395); *Stewart.*, 2017 WL 3670711, at *10 ($400, $400).

[44] *Gurasich*, 2016 WL 3683044, at *5 (internal citations omitted).

[45] *Id.* at *9 ("[C]ourts may reduce [a fee] award where the records do not justify the hours spent.") (citing *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986)).

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that Plaintiff's counsel exercised billing judgment for the requested time, the court will do its best to exclude from the fee award hours that were not reasonably expended."[46] Plaintiff's counsel provides no indication that they have exercised any discretion whatsoever.[47] To the contrary, their invoices are rife with entries showing duplicate work,[48] vague entries, and entries showing tasks performed by an attorney that reasonably could have been performed by administrative support, such as an assistant or paralegal.[49] Exhibit A contains an analysis of such inappropriate billing.

Second, Plaintiff's counsel has block-billed their time entries, which makes it impossible for "a court . . . to determine whether all time in the entry was reasonably expended."[50] Exhibit A also identifies block billed entries.

Third, it is patently unreasonable for Plaintiff's two attorneys to bill over 500 hours to this matter. Plaintiff's counsel claims their hours total is justified because this matter presented "complex issues" and was "fact-intensive,"[51] but in reality this was a routine, straightforward appeal of a benefits decision decided on the administrative record without any discovery. The complaint in this supposedly "fact-intensive" matter amounted to all of eight pages and forty-three paragraphs.[52] While they claim the Board "contested Plaintiff's case at every stage" and placed "obstacles" in their path, the obstacles Plaintiff's counsel points to—including, apparently, motions to dismiss and for judgment on the administrative record—were reasonable efforts to eliminate Plaintiff's two untenable claims, which the Court dismissed. What is more, Plaintiff's

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[46] *Id.*

[47] The only billing judgment Mr. Coleman has appeared to use is rounding up to the nearest hour or half hour: 42% of his entries end in .5 or .0.

[48] *Gurasich*, 2016 WL 3683044, at *9.

[49] *Perris Valley Cmty. Hosp. LLC v. S. California Pipe Trades Admin. Corp.*, No. 13-cv-291, 2014 WL 12687444, at *7 (C.D. Cal. Apr. 16, 2014) ("Defendants submit several billing entries for time spent on clerical and administrative tasks such as filing documents and scheduling. These entries must be deleted from the total number of hours because '[t]asks such as reviewing Court-generated notices, notifying clients of court hearings, filing documents with the Court, communication with court staff, scheduling, and corresponding regarding deadlines, are clerical and not compensable.'")

[50] *Gurasich*, 2016 WL 3683044, at *8.

[51] Pl.'s Mot. at 11.

[52] *See generally* SAC.

counsel is not forthcoming about the total amount of compensation they will receive in this matter. Buried in Mr. Coleman's declaration is the fact that his firm's agreement with Plaintiff is a contingency fee under which his firm will be paid "a percentage of the total recovery."[53] Will Plaintiff's counsel pocket both fees from the Board and a portion of their client's benefits? Withholding this information makes it impossible for the Court to understand whether Plaintiff's counsel's total compensation will be reasonable.

III. CONCLUSION

For the aforementioned reasons, the Court should deny Plaintiff's counsel's request for attorney's fees or hold a decision on the matter until remand is complete.

Dated: May 1, 2018

Respectfully submitted,

/s/ Michael L. Junk

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[53] Decl. of Terrence J. Coleman in Supp. of Pl.'s Mot. for Att'ys' Fees and Costs (Dkt. 86-1) ¶ 11 ("Our fee agreement with Plaintiff in this case is a contingency fee. Under this compensation arrangement, our firm advanced all costs incurred in connection with the claim. Additionally, our fees are based on a percentage of the total recovery to the client.").